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No. 88-1481

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

OEN YIN-CHOY,
Petitioner,

VS.

GLEN S. ROBINSON,
United States Marshal
for the Northern District of California,
Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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As this case demonstrates, during the Court's 53-year silence on extradition, conflict and confusion have arisen in the lower courts' handling of such matters. Even the Justice Department described extradition case law as "very outdated" when it supported a proposed legislative revamping of U.S. extradition law. This case presents questions of proper interpretation and application of extradition treaties, of the type of evidence to be received and the evidentiary standards to be applied, and of the procedural protections and legal rights to be afforded the accused. The Court's guidance would greatly assist the federal judiciary and the Bar.

ARGUMENT

I. VIOLATIONS OF THE U.S.-U.K. TREATY

A. Extradition to a Third Country

The Government does not dispute that Hong Kong reverts to Chinese rule on July 1, 1997; that Mr. Oen, if extradited and convicted, could be incarcerated on that date and thereby pass into Chinese custody; that China is a "third state" within the meaning of Article XII(1) of the Treaty; or that the Hong Kong government has refused to provide any assurances that Mr. Oen and other similarly extradited persons will not pass into Chinese custody.

The Government's only response is to draw the meaningless distinction between "extradition" and "surrender" relied upon by the Ninth Circuit. (*See* Brief for the Respondent in Opposition ("Resp. Br.") at 7.) The Government does not respond to Mr. Oen's observation that this distinction renders meaningless the undertakings of Article XII(1) and ignores the Treaty's underlying purpose. *See Reed v. Wiser*, 555 F.2d 1079, 1088 (2nd Cir.), *cert. denied*, 434 U.S. 922 (1977) (treaty should be interpreted to effectuate its evident purpose). The protections of Article XII(1) are particularly important where, as here, the "third state" has a criminal justice system radically different from ours and has no extradition treaty with this country. (App. T at A-85-A-91.) The Ninth Circuit's decision would permit any foreign nation to turn over custody of a person extradited from the United States to any "third state" at any time, so long as the change in custody is effectuated by a "surrender" rather than by "extradition." This result does violence to the numerous United States extradition treaties containing the third-state clause,[1] and warrants review by this Court.

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[1] *See, e.g.*, Treaties on Extradition Between the United States and: Australia, May 14, 1974, art. XIV, 27 U.S.T. 959, T.I.A.S. No. 8234; Canada, Dec. 3, 1971-June 28, 1974, art. 12, 27 U.S.T. 985, T.I.A.S. No. 8237; Ireland, July 13, 1983, art. XI, T.I.A.S. No. 10813; Italy, Oct. 13, 1983, art. XVI, T.I.A.S. No. 10837; Japan, Mar. 3, 1978, art. VII, T.I.A.S. No. 9625; Netherlands, June 24, 1980, art. 15, T.I.A.S.

B. Prosecution for Additional Offenses

The Government does not deny that Chinese law would permit retrial of Mr. Oen for offenses other than those for which he was extradited; that the Chinese criminal justice system is radically different from ours; or that Hong Kong cannot assure that China will not prosecute Mr. Oen for additional offenses.

The Government merely responds that "[t]he question whether a person in petitioner's position may be prosecuted [for additional offenses] by a State resuming sovereignty (but not a party to the Treaty) is simply not answered by the Treaty." (Resp. Br. at 8.) The Government closes its eyes to the Treaty language and the overriding purpose of the rule of specialty. *See United States v. Rauscher*, 119 U.S. 407, 422 (1886) (in light of the "manifest scope and object of the treaty itself," court rejected government's argument that it could try defendant for non-enumerated crimes in "the absence of express restriction in the [U.S.-U.K. extradition] treaty"). To obtain extradition from the United States, the foreign nation agrees not to subject the extraditee to prosecution or punishment for offenses not listed in the extradition order. The rule of specialty is perhaps also stated as protecting "an extradited person from the exercise of coercive power by the receiving state on matters not anticipated by the extradition." *See Van Cauwenberghe v. Biard*, ____ U.S. ____, 108 S. Ct. 1945, 1951 (1988). A Hong Kong "surrender" of Mr. Oen to China would be precisely the sort of "exercise of coercive power" and "abuse [of] the extradition processes of the extraditing state" that the rule of specialty is designed to prevent. *See id.* This flouting of the Treaty warrants review by this Court.

The recent political upheavals in China heighten the importance of the Treaty issues not only for Mr. Oen, but for every person sought to be extradited to Hong Kong or to Macau.[2] These

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No. 10733; New Zealand, Jan. 12, 1970, art. XIII, 22 U.S.T. 1, T.I.A.S. No. 7035; Sweden, Oct. 24, 1961, art. IX, 14 U.S.T. 1845, T.I.A.S. No. 5496; West Germany, June 20, 1978, arts. 22-23, 32 U.S.T. 1487, T.I.A.S. No. 9785.

[2] Macau, a Portuguese colony, will revert to Chinese rule in 1999. The United States has an extradition treaty with Portugal which covers

issues will recur whenever there is a change in the nation exercising sovereignty over a territory. This Court also can provide needed guidance to the lower courts regarding the degree to which foreign nations will be required to satisfy their extradition treaty obligations and the manner in which treaty language is to be interpreted.

II. THE RIGHT TO CHALLENGE TRANSLATED TESTIMONY

The Government concedes that signed written witness statements in the Chinese language exist. (Resp. Br. at 9.)[3] The Government does not contest the district court's finding that a "substantial question about the competency of the translator" was raised. (App. G at A-23.) Nor does the Government contest that the prosecutor admitted that Mr. Oen would be able to demonstrate numerous differences between the original Chinese statements and the English affirmations. (CR 12 at 1515.)

The Government advances two flawed arguments. First, based upon a distorted recitation of the factual record,[4] the Government claims that "the English-language affidavits . . . were not originally written in Chinese and then translated into English." (Resp. Br. at 9.) The Government overlooks the affidavit of case agent Yui which stated that:

> All these witnesses had by March 1987 provided statements in the Chinese language. These statements had been translated into the English language by either police interpreters or Chinese language officers. I was earlier instructed by Chief Inspector Ip Lau Chuen that all affirmations of witnesses in the case were to be prepared in the English

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extradition requests from Macau. Extradition Convention, May 7, 1908, United States-Portugal, art. IV, 35 Stat. 2071, T.S. No. 512.

[3] Because the Ninth Circuit assumed, incorrectly, that there were no original written Chinese statements, it never reached the merits of the translation issue.

[4] Mr. Oen has previously described the translation process (Oen Pet. at 13 n.9) and invites the Court's examination of the record.

> language and were to be based, as necessary, on the English translations of the Chinese statements that the witnesses had previously provided.

(App. U at A-95.) The Government's reasoning—that since the contents of the witnesses' signed Chinese statements were substantially altered during the process of converting them into English affirmations, the accused should be denied access to the Chinese statements—is profoundly dangerous and undermines the integrity of the extradition court's probable cause finding.

The Government next asserts that "the witnesses approved and authorized the affidavits, as orally translated into Chinese, immediately prior to signing them." (Resp. Br. at 10.) The record demonstrates that when the police had written the English language affirmation, a police translator, out of the presence of the court, orally translated the English affirmation into Chinese. (App. U at A-96-A-98; App. V at A-102-A-103.) The Government fails to mention that the witnesses had no way of knowing whether this translation was accurate, and that the Hong Kong police failed to tape record or otherwise memorialize the oral translations. Thus, Mr. Oen's *only* check on the accuracy of the translation process is to compare the original Chinese written statements with the English affirmations. Guidance from this Court is needed on the extent to which the accuracy of translated evidence must be insured.

III. THE RIGHT OF CROSS-EXAMINATION

The Government sidesteps the fact that no case has held that a person facing extradition may not cross-examine a key witness *present in court*. Nor does the Government explain why this fundamental right should be denied when the consideration justifying its denial—not burdening the foreign government with the cost of transporting the witness to the United States—is removed. *Cf. Coy v. Iowa*, ____ U.S. ____, 108 S. Ct. 2798, 2803 (1988) (if any exceptions to the right of confrontation exist, "they would

surely be allowed only when necessary to further an important public policy").[5]

The Government's attempt to analogize an extradition hearing to a preliminary hearing is misguided. An extradition typically involves a complete uprooting of the accused from the country in which he resides and a geographic separation from family and friends; it leads to prosecution and potential incarceration under the laws of a foreign nation. Such consequences do not flow from a preliminary hearing. Equally important, the Government overlooks the fact that defendants *do* have the right to cross-examine witnesses in preliminary hearings. (Fed. R. Crim. P. 5.1(a).) Finally, the Government does not deny that the Justice Department supported proposed legislation that would have provided the right of cross-examination in extradition hearings. (*See* Oen's Pet. at 16 n.12.)

The Government concedes that this Court in *Grin v. Shine*, 187 U.S. 181, 184 (1902), stated that the extradition process must not sacrifice the "legal or constitutional rights of the accused." The Government's observation that *Grin* "did not further identify" those legal or constitutional rights (Resp. Br. at 11) amounts to a concession that the law of extradition needs to be clarified.

IV. THE EXCLUSION OF INCOMPETENT EVIDENCE

18 U.S.C. § 3190 establishes a means of authenticating documents offered by a foreign government. The Government argues that it also establishes a standard for judging the evidence's competency. (Resp. Br. at 12.) This argument confuses the two concepts.

Authenticity requires that a document be what the party offering it purports it to be. 5 D. Louisell & C. Mueller, *Federal*

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[5] Indeed, in light of the transportation revolution that has occurred during the 73 years since this Court's decision in *Bingham v. Bradley*, 241 U.S. 511 (1916), it is now questionable whether foreign governments are truly "burdened" by transporting their key witnesses to the U.S. This petition thus presents the opportunity to re-examine *Bingham* in light of modern realities.

Evidence § 506 at 16-17 (1981). Competency requires that contents be sufficiently reliable to qualify for consideration by the court. *See Frick v. Oklahoma*, 509 P.2d 135, 136 (Okla. Crim. App. 1973) ("Competent evidence is that which is relevant and material to the issues to be determined"); *Clifton v. Arnold*, 87 So.2d 386, 389 (La. App. 1956). The fact that a document is authentic does not mean that it is admissible; it still must satisfy competency requirements such as foundation and relevancy. *United States v. Southard*, 700 F.2d 1, 22-23 (1st Cir.), *cert. denied*, 464 U.S. 823 (1983); *United States v. One 1968 Piper Navajo Twin Engine Aircraft*, 594 F.2d 1040, 1042 (5th Cir. 1979); 5 D. Louisell & C. Mueller, *Federal Evidence* § 506 at 22.

The Ninth Circuit's decision eliminates the competency requirement by holding that all evidence that is authentic pursuant to section 3190 is automatically competent. The Government believes this is acceptable because "the court may in its discretion give [unreliable evidence] little weight." (Resp. Br. at 12.) But the Ninth Circuit does not *require* unreliable evidence to be disregarded. Here, the district court granted extradition without any consideration of the evidence's reliability. (App. A at A-17-A-18.) This result conflicts with the holding of *Collins v. Loisel*, 259 U.S. 309, 316 (1922), that the extradition court must determine if "competent evidence" supporting extradition exists.

The Government ignores the fact that federal courts have traditionally *excluded* incompetent evidence, not merely afforded it lesser weight. *See In re Sindona*, 450 F. Supp. 672, 679 (S.D.N.Y. 1978); *United States v. Artukovic*, 170 F. Supp. 383, 391 (S.D. Cal. 1959). The Ninth Circuit's opinion also conflicts with these cases.

The Government argues that the Ninth Circuit's interpretation of section 3190 does not violate separation of powers because it is like Federal Rules of Evidence 902(1) and 902(3). Those rules, however, do not equate authenticity with competency; they preserve the judiciary's power to reject incompetent evidence. *United States v. Southard*, 700 F.2d at 22-23; *United States v. One 1968 Piper Navajo Twin Engine Aircraft*, 594 F.2d at 1042. The Ninth Circuit's decision allows Congress to rob the judiciary of that

power in violation of the Constitution. Certiorari should be granted to reverse this result.

V. RECUSAL

The Government argues that a district judge may hear a habeas challenge to his prior extradition order because habeas review "is confined to issues other than those previously decided." (Resp. Br. at 15.) The Government misunderstands the role of habeas in extradition. "Since there is no direct appeal from the [extradition] order . . . the Judge from whom [habeas] relief is sought . . . sits as a reviewing court . . . ." *Shapiro v. Ferrandina*, 355 F. Supp. 563, 567 (S.D.N.Y.), *modified*, 478 F.2d 894 (2nd Cir.), *cert. dismissed*, 414 U.S. 884 (1973) (citation omitted).[6]

Clearly, habeas review of an extradition decision is, in the Government's words, "like appellate review of a lower court proceeding." (Resp. Br. at 17.) Motions for a new trial and § 2255 proceedings (Resp. Br. at 16), are not analogous; neither serves as a surrogate for appeal. The reasoning of *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978), which the Government does not challenge, is therefore compelling: a judge should be required to recuse himself from hearing a habeas challenge to his own extradition order. Certiorari should be granted to clarify this issue.

VI. "EXPLANATORY" v. "CONTRADICTORY" EVIDENCE

The Government does not deny that the lower courts have found the *Collins v. Loisel*, 259 U.S. 309, 316-17 (1922), distinction between "contradictory" and "explanatory" evidence confusing and difficult to apply. Instead, the Government asserts that "[a]ny difficulty in applying that distinction is not presented

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[6] Contrary to the Government's assertion (Resp. Br. at 5), the habeas petition was not randomly assigned to Judge Schnacke. The petition was randomly assigned to the Honorable J. P. Vukasin, Jr., and then transferred to Judge Schnacke under the related case local rule. (CR 28.)

here." (Resp. Br. at 17.) The Government then totally ignores the evidence proffered by Mr. Oen.[7]

Contrary to the Government's suggestion (*id.*), Mr. Oen did not try to "dispute" the Hong Kong government's evidence of "complex disbursement patterns" of the proceeds of the relevant loans. Rather, he offered evidence *explaining* that there were perfectly legitimate reasons for such complexity. (App. S at A-70.) And, he offered other evidence *explaining* that the conclusion of falsity reached by the Hong Kong government's expert was illogical. (*Id.* at A-71.) The Government does not explain why such evidence should be classified as "contradictory." The Government's inability to do so is itself a demonstration of the difficulty of applying *Collins* and of the need for its clarification.[8]

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[7] The Government erroneously states that Mr. Oen is charged with embezzlement. (Resp. Br. at 3.) Mr. Oen was charged with the crime of false accounting. (CR 7 at 1-5.) When Mr. Oen noted the absence of evidence of the intent element of the Hong Kong crime of false accounting (*see, e.g.*, CR 8 at 378-80), the only assertion of "personal gain" the prosecutor could make was that Mr. Oen allegedly participated in the offenses to save his job as chairman of Union Bank (CR 10 at 1076), although there was no evidence that his job was in jeopardy.

[8] It should be noted that the proposed legislative reform of extradition law (Oen Pet. at 16 n.12) abandoned the contradictory/explanatory dichotomy in favor of the easily-applied standard that "the person sought to be extradited has the right . . . to introduce evidence with respect to the issues before the court." *Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 34 (1983), at 10.

CONCLUSION

For the foregoing reasons, Mr. Oen's petition should be granted.

Dated: June 2, 1989

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